IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

LITTLE ROCK SCHOOL DISTRICT	PLAINTIFF
v. Case No. 4:82cv00866 DPM	
PULASKI COUNTY SPECIAL SCHOOL DISTRICT NO. 1, NORTH LITTLE ROCK SCHOOL DISTRICT, ET AL	DEFENDANTS
MRS. LORENE JOSHUA, ET AL	INTERVENORS
KATHERINE KNIGHT, ET AL	INTERVENORS

PLAINTIFF LITTLE ROCK SCHOOL DISTRICT'S BRIEF ON RECUSAL ISSUES

Introduction

The Court was assigned this case upon the recusal of the Honorable Brian S. Miller on June 24, 2011. The Court held a status conference on July 1, 2011 to discuss with the parties the pending issues in the case. At that conference, the Court made a full disclosure on the record concerning his service as law clerk to the Honorable Richard Shepherd Arnold during an earlier phase of this case, and asked the parties to brief the question of whether that service must or should cause him to disqualify from this case.

Background

The Court served as law clerk to the Honorable Richard Shepherd Arnold in the Eighth Circuit Court of Appeals from mid-August, 1989 until mid-August, 1991. During that time, the Eighth Circuit heard two appeals in a previous phase in this case, although the decision in the second appeal was not issued until the Court completed his service as law clerk to Judge Arnold. In the first decision, reported at 921 F.2d 1371 (8th Cir. 1990), the Eighth Circuit reversed the district court's modifications of the Settlement Agreement and desegregation plans agreed upon

by the parties and ordered the district court to approve the parties' Agreement and plans as written by them. *LRSD v. PCSSD*, 921 F.2d at 1394. In the second decision, the Eighth Circuit established the standard by which the District Court should review proposed modifications to the desegregation plans. Appeal of LRSD, 949 F.2d at 256-58. No party appeared as Appellee to oppose either of those decisions. The Court was not the law clerk assigned to those cases and has no recollection of doing any work for Judge Arnold with respect to those cases.

Governing Principles

A United States District Judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). The Court may accept from the parties a waiver of any ground for disqualification which arises only under 28 U.S.C. § 455(a), "provided it is preceded by a full disclosure on the record of the basis for disqualification." 28 U.S.C. § 455(e).

A United States District Judge "shall also disqualify himself" . . . [w]here he has served in governmental employment and in such capacity, participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy. . ." . 28 U.S.C. § 455(b) A judge may not accept from the parties a waiver of any ground for disqualification under 28 U.S.C. § 455(b). 28 U.S.C. § 455(e).

The parties are entitled to the judge they draw by random selection and a judge should not lightly recuse or disqualify himself unnecessarily. *Davis v. C.I.R.*, 734 F.2d 1302, 1303 (8th Cir. 1984); *See also Fletcher v. Conoco Pipe Line Company*, 323 F.3d 661, 664 (8th Cir. 2003) (quoting *Pope v. Fed. Express Corp*., 974 F.2d 982, 985 (8th Cir. 1992) ("A judge is presumed to be impartial and the party seeking disqualification bears the substantial burden of proving otherwise.")

Discussion

28 U.S.C. § 455(a)

The Court's work as a law clerk for Judge Arnold two decades ago during the time another clerk assisted Judge Arnold in the preparation of two opinions in this case does not provide a reasonable basis for questioning the Court's impartiality. First, there is no reason to question the impartiality of the Eighth Circuit Court of Appeals or of Judge Arnold. The 1989 and 1990 decisions were based on the neutral application of the law to facts developed on the record in the district court. More importantly, all of the parties to this case supported both appeals. *See Appeal of LRSD*, 949 F2d 253 (8th Cir. 1991) ("There were no appellees in this case"); *LRSD v. PCSSD*, 921 F.2d 1371 (8th Cir. 1990) (Counsel for Appellee were Mssrs. Lavey and Allen who, in effect, represented the District Court.).

Second, the practice of the Eighth Circuit Court of Appeals is to assign a permanent panel of judges to long-running institutional reform cases such as this one. In view of the recusal statutes and the "Code of Conduct for United States Judges," the Eighth Circuit would not have established such permanent panels if previous involvement with the case alone provided a sufficient basis to question a judge's impartiality.

Third, the issues before the Court in 1990 and 1991 are not the same issues that are before the District Court today. The questions of whether the Settlement Agreement and desegregation plans should have been approved and how the desegregation plans may be modified are distinct from the questions of whether NLRSD and PCSSD have attained unitary status, whether the State has complied with its obligations under the Settlement Agreement, or whether magnet schools and majority to minority transfers continue to be efficacious remedies for residential segregation.

Finally, the Court was not the law clerk assigned to this case by Judge Arnold and has no recollection of contributing in any way to the preparation of the 1989 and 1990 Eighth Circuit opinions. Under these circumstances, the Court's impartiality cannot reasonably be questioned. In any event, pursuant to 28 U.S.C. § 455(e), LRSD waives any ground for disqualification which might possibly exist under 28 U.S.C. § 455(a).

28 U.S.C. § 455(b)

The primary question under 455(b) is whether a federal law clerk serves as "counsel" or an "adviser" in a case decided in part by the judge who employs the law clerk. There appears to be no case which directly answers this question. A common sense reading of § 455(b) would lead to the conclusion that a law clerk is neither counsel nor an adviser within the meaning of that rule.

Section 455(b)(2) concerning a judge's previous work in private practice, and § 455(b)(3), concerning a judge's prior governmental employment, both seem to be concerned with the potential bias of a judge who previously served as an advocate in the case now before him. It makes sense to presume that one who has litigated a case as an advocate may harbor some bias as a result of that advocacy. The presumption of bias makes no sense when applied to a law clerk whose only association with the case was in the service of a federal judge who is presumed to be an impartial decision maker.

This view of § 455(b)(3) comports with the practice of the Eighth Circuit Court of Appeals of assigning a permanent panel of judges to long-running, institutional reform cases, including this one. If § 455(b)(3) can be read to presume bias or the appearance of bias from prior judicial service on a case, the Eighth Circuit practice of assigning permanent panels to complex, long- running cases would be in conflict with that rule.

Finally, "the rules concerning disqualification based on prior government service are less stringent than those that apply to prior private employment." *Kendrick v. Carlson*, 955 F.2d 1440, 1444 (8th Cir. 1993). While § 455(b)(2) requires that a judge disqualify himself where in private practice "a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter," § 455(b)(3) requires disqualification only if the "judge, while in government employment, himself served as counsel in the case." *Id.* If a judge who worked on a case in private practice is required to disqualify only on the basis of his or his partner's advocacy, there should not be a more stringent standard applied to judges who were employed in government but not as advocates.

The Eighth Circuit Court of Appeals has rejected efforts in this case to disqualify a district judge based on the work of the judge or his law partner on a distinct aspect of a previous phase of the case. *See LRSD v. Armstrong*, 359 F.3d 957, 961 (8th Cir. 2004) ("Not only was his [Judge Wilson's] prior representation of Judge Woods wholly distinct; the issue before the Judge in the current proceeding involved a current version of the parties agreement to settle the underlying case, an agreement that was never before Judge Woods, and that was not even in existence until long after he relinquished the case"); *LRSD v. PCSSD*, 839 F.2d 1296, 1302 (8th Cir. 1988) ("We cannot say that the trial judge's former law partner's submission of an *amicus* brief in a case involving, to a large extent, different issues and different remedies two decades ago requires recusal under § 455(b)(2), nor do we believe that Congress intended such a result.")

Conclusion

The decisions handed down by the Eighth Circuit Court of Appeals during this Court's time there were supported by all of the parties. They have become law of the case and will have to be followed by any judge who is assigned to this case. This Court's remote and tenuous

association with those cases, not as an advocate but as a law clerk, does not provide a sound basis for recusal under either 28 U.S.C. § 455(a) or (b).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 12, 2011, I have electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which shall send notification of such filing to the parties of record.

/s/ Christopher Heller